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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network	)))	CC Docket No. 95-115

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To: The Commission

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), by its attorneys, hereby submits its Reply Comments in response to the Notice of Proposed Rulemaking ("NPRM") released July 20, 1995, FCC 95-281.[1/] In these Reply Comments, TRA discusses the legal impediments to Commission preemption of state laws permitting the disconnection of local service for nonpayment of long-distance charges, and highlights arguments that have been made that disconnection of service for nonpayment of long-distance charges is a significant factor contributing to the incidence of households without telephone service.

I.

INTRODUCTION

TRA supports reasonable efforts to increase telephone subscribership in this country through fair, balanced policies targeted at achieving that goal without unduly burdening carriers or ratepayers generally. As TRA asserted in its initial Comments, if it is true that non-payment of long-distance toll charges is a significant factor in the disconnection of service

1/ On October 20, 1995, the Chief of the Common Carrier Bureau released an Order Extending Reply Comment Period, DA 95-2197, which extended until November 14 the date by which reply comments are to be filed in this proceeding. Because the Commission was closed from November 14 to November 17, TRA is filing these Reply Comments on the first day after November 14 that the Commission is open.

and thus in the incidence of households that do not have telephone service, then measures designed to assist subscribers in controlling the cost of telephone service should be explored.[2]

As discussed in greater detail below, however, several of the parties filing initial comments have challenged the Commission's assumption that nonpayment of long-distance charges is a significant factor in disconnection of local telephone service, which itself contributes significantly to the incidence of households that do not have telephone service. If the Commission's assumption is not correct, then measures targeted at assisting subscribers to pay for long distance service, and measures that essentially excuse nonpayment of charges for such service, should not be expected to result in an increase in the penetration of telephone service among non-subscribing households. In addition, failure of the assumption would further weaken the already tenuous position that the Commission has the authority to preempt state policies permitting disconnection of local service for nonpayment of long distance telephone charges.

II.

ARGUMENT

A. The Assumption that Nonpayment of Long Distance Charges Is a Meaningful Factor In Disconnection of Local Service Appears Flawed.

Although the Commission has cited failure to pay for long distance service as a primary reason that telephone service is disconnected, which in turn is a significant factor in the lack of local telephone service for some 6% of the population,[3] a number of parties filing

[2] Such measures could include mandating local carriers to offer prepaid calling card-only payment options for toll calls, implementing programs enabling subscribers to pre-set toll calling limits, Comments of AT&T Corp. ("AT&T Comments") at 4, n.8, and toll call blocking, id.; Comments of BellSouth Telecommunications, Inc. ("BellSouth Comments") at 6-7.

[3] NPRM at ¶ 27 (footnote omitted).

initial comments have raised compelling questions as to the accuracy of that assumption. Before the Commission implements measures designed to restrict disconnection of service for nonpayment of long-distance charges, it must determine with confidence the accuracy of this underlying assumption.

Parties filing initial comments in this proceeding have made two points in this regard: First, disconnection of local service is not as significant a factor as the Commission has assumed in the absence of presubscribed telephone service in those households without service. Second, disconnection of local service is not the result of nonpayment of long distance charges as often as the Commission believes.

As to the first point, while the Commission has stated its belief that Pennsylvania's prohibition against disconnection for nonpayment is responsible for the state's high subscribership rate, NPRM at ¶ 30, several states that permit disconnection of service for nonpayment -- Virginia, Wisconsin, Utah -- have higher telephone penetration rates than Pennsylvania, according to the Commission's own August 1, 1995 report on "Telephone Subscribership in the United States." Report at 4.

According to Southwestern Bell Telephone Company ("Southwestern Bell"), "studies demonstrate that there are some people who choose not to have landline telephone service in their homes." Southwestern Bell Comments at 2 and n. 2 (citing M. Mueller & J. Schement, "Six Myths of Telephone Penetration" (Feb. 23, 1995) (unpublished manuscript); *accord*, Comments of Indiana Utility Regulatory Commission ("IURC") at 9.

As to the second point, AT&T Corp. ("AT&T") has stated in its Comments that "customers are rarely disconnected solely for failure to pay long distance charges (much less only interstate long distance charges)." AT&T Comments at 8. BellSouth has stated that of the almost 14 million residential accounts in its nine-state region, some 15 percent receive collection notices for nonpayment in any given month, but only two percent of all accounts are temporarily denied service during the month for nonpayment, and only one quarter of all the accounts that are temporarily denied service are eventually disconnected for nonpayment. BellSouth Comments at 3 & n.4.

B. If Nonpayment of Long Distance Charges Contributes Significantly to Disconnection of Service and Decreased Telephone Subscribership, Cost-Control Measures Should be Made Available to Subscribers.

It is apparent from the initial comments that have been filed that measures that can assist subscribers in controlling the cost of telephone service are far preferable to policies that enable them to incur unmanageable costs with impunity. As TRA asserted in its initial Comments, such measures place the responsibility for controlling utilization of toll telephone service where it should be -- on users, rather than carriers -- and therefore allocate telecommunications resources in a more rational manner.

Moreover, requiring subscribers to control their spending on toll telephone calls relieves carriers of the inevitable burden of uncollectible charges which would ultimately be passed onto ratepayers. Long distance carriers' ability to collect unpaid amounts will significantly decrease and the likelihood that carrier losses will be passed onto ratepayers in the form of higher rates across-the-board will increase if disconnection of local service as a sanction for nonpayment of long-distance charges is prohibited.

AT&T claims that its "average rate of uncollectibles in states that prohibit local cut-off for non-payment of long distance charges is approximately 30 per cent higher than in states which allow local cut-off." AT&T Comments at 8, n.15. The Bell Atlantic telephone companies ("Bell Atlantic") report that Pennsylvania's prohibition against disconnection has resulted in uncollectibles that have increased more than 400% and administrative costs that have risen more than $24 million per year. Bell Atlantic Comments at 4. And according to BellSouth, representatives of IXCs and other LECs estimate that denial of disconnect authority can multiply uncollected receivables two to six times. BellSouth Comments at 3-4.

The burden on carriers of a disconnection prohibition would be compounded in states, such as New York, that require carriers to permit partial payments. As Sprint Corporation ("Sprint") has related,

> Sprint's experience with the burden of partial payment rules is consistent with its general experience that the administration of regulations concerning DNP[[4/]] practice is burdensome and increases to subscribership minimal. In New York, for example, when a DNP customer approaches Sprint and requests service, Sprint is required by regulators to offer them [sic] an opportunity to reconnect if deposit arrangements are made. After spending approximately $32,000 annually for postage and personnel alone, Sprint has found that extremely few customers are willing or able to accept the offer.

Sprint Comments at 11.

The solution for less than universal subscribership is not to allow subscribers to make unlimited telephone calls with the confidence that their local service will not be disconnected if they are unable to pay. Instead, proposals should be considered that would enable telephone subscribers to <u>control</u> the use of long-distance service within their households. Such proposals could benefit subscribers by helping them match their use of long-distance service to their budgets.

Requiring carriers to offer prepaid calling card-only payment options for toll calls is one way of assisting consumers to control the cost of telephone service. Toll-call blocking services, identified by a number of commenters, provide an alternative means for subscribers

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[4/] "DNP" refers to disconnection of service for nonpayment.

to maintain local service by controlling toll call expense.[5] The use of prepaid calling cards, toll-call blocking, and similar measures should therefore be encouraged as a means of preventing unexpectedly large long-distance bills that could result in disconnection of local service.

Finally, a number of commenters, including TRA, have asserted that increasing consumer education as to the availability of existing subscriber assistance programs, such as the Lifeline and Link Up America programs, would help to raise the rate of telephone subscribership.[6] As the public advocates of four states wrote in their consolidated comments:

> [We] support the assumption that consumers are generally unaware of the availability of assistance in obtaining the protection of basic telephone service. We believe that the universal service objectives will only be achieved if there is a coordinated effort to identify non-users and bring them into the network.

Comments of the Delaware Public Advocate, Florida Office of Public Counsel, Maine Public Advocate, and Missouri Office of the Public Counsel ("State Consumer Advocates") at 11.

Consumer education, combined with cost-control measures for subscribers, should increase telephone subscribership without unduly burdening carriers or ratepayers generally, and without requiring that the Commission tread unnecessarily on state authority to regulate intrastate telecommunications service, which would occur if the Commission were to prohibit disconnection of local service for nonpayment of long-distance charges.

C. The Commission Lacks the Authority to Preempt States that Permit Disconnection of Service for Nonpayment of Long Distance Charges.

The Commission's proposal to prohibit disconnection of local service for nonpayment of long-distance charges would constitute an impermissible extension of federal authority over

[5] *See supra* note 2.

[6] *E.g.*, Comments of the Public Utility Law Project of New York, Inc., at 15.

a matter of purely local concern, which is reserved to the states. Section 2(b)(1) of the Communications Act provides in this regard that

> [n]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."

47 U.S.C. §152(b)(1).

This limitation has been interpreted by the federal courts as permitting the Commission to preempt state authority over a local matter only when: (1) the matter to be regulated has both interstate and intrastate components; (2) Commission preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would "negate . . . the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[7] In the instant case, the Commission can not meet the second and third prongs of this test; therefore, it may not prohibit disconnection of local service for non-payment of long distance charges because such action would result in impermissible preemption of state authority.

1. Commission Preemption Would Affect a Purely Intrastate Activity Which Is Severable from Interstate Activity.

The Commission has asserted that the intrastate and interstate components of telephone service are inseverable in that it is impossible for a subscriber to have long-distance service if its local service has been disconnected. NPRM at ¶ 32. It has admitted, however, that it may now be possible for the LECs to block interstate toll calls and to offer only local service. NPRM at ¶ 29. Thus, the technological limitations that once caused the Commission

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[7] Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (quoting National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989)).

to conclude that local dial tone service and interstate interexchange service are inseverable no longer justify assertion of Commission authority over local service as a consequence of regulating purely interstate activity.

According to many, if not most, of the commenters, disconnection of local telephone service is a matter that should be entirely within the exclusive jurisdiction of each state.[8/] As the New York State Department of Public Service ("NYDPS") has stated, "it is not clear . . . that mandated national solutions will be as effective as state policies which are tailored to reflect conditions within a particular state." NYDPS Comments at 1.

This view was echoed by the Pennsylvania Public Utility Commission ("PAPUC"), which stated in its initial comments that:

> [t]he ability to ensure maximum connectivity to the network and to emergency services coincides with the States' police power responsibilities, and therefore, is best left to determination by the State. Furthermore, given States' proximity to local markets, and the demographical and geographical differences between States, we believe that we are in the best position to structure the optimal mix of policies that will be most effective in reaching the various classes of nonsubscribers within our respective jurisdictions.

PAPUC Comments at 3.

When the U.S. Court of Appeals upheld the Commission's preemption of state regulation of LEC rates for DNP service,[9/] it made it clear that its decision was based on a lack of evidence that disconnection of interstate service could not be achieved without disconnecting local service, but that, if the intrastate and interstate elements could be separated --

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[8/] *See, e.g.,* Comments of IURC at 6; Comments of the Public Utilities Commission of Ohio ("OPUC") at 4-7; Comments of State Consumer Advocates at 3; Comments of the NYNEX Telephone Companies at 5-6; Comments of MCI Telecommunications Corporation at 9-12.

[9/] The dispute did not involve state authority to regulate whether carriers could disconnect local service for nonpayment of toll charges, a matter which the Commission left exclusively to the states. Maryland PSC v. FCC, *supra*, note 7, at 1512-13; Detariffing of Billing and Collection Services, 102 F.C.C.2d 1150, 1176-66 (1986).

which they can today -- it might not have permitted the Commission to preempt state regulation of DNP service. The Court wrote:

> The Maryland PSC suggests that it may be possible technologically to cut off interstate access independent of local service. . . . At the time it issued the Detariffing Order, the FCC believed that such a separation was not practical. . . . The Maryland PSC has not introduced any evidence in its own proceedings or before the FCC to cast doubt on this finding. . . . If the Maryland PSC should produce such evidence, that would present a different case.

Maryland PSC v. FCC, *supra*, note 7, 909 F.2d at 1516-17 (citations omitted).

According to a number of the commenters, it is now possible to block interstate service without disconnecting local service.[10/] Since the interstate and intrastate elements are thus severable, there is no basis for the Commission to interfere with state regulation of local service because nonpayment of interstate charges may be involved.

2. Commission Preemption is Not Necessary to Protect A Valid Federal Regulatory Objective.

Not only must the Commission establish that a matter to be preempted has interstate and intrastate elements that are inseverable, but it must prove that preemption is necessary to protect a valid federal regulatory objective. As the U.S. Court of Appeals for the District of Columbia stated, "the FCC may not preempt solely because state regulation of a matter of primarily local interest . . . conflicts with its ideas of sound federal economic or regulatory policy."[11/]

As noted in Section A above, above, a legitimate question exists whether disconnection of service for nonpayment of long-distance charges accounts significantly for the roughly 6% of the households in this country that lack telephone service. Absent conclusive evidence that

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[10/] *See, e.g.*, MCI Comments at 10; OPUC Comments at 8; Comments of NYNEX at 6.

[11/] Public Service Commission of Maryland v. FCC, *supra*, note 7, 909 F.2d at 1516.

a causal connection exists between nonpayment of interstate charges and a decrease in telephone service, the Commission can not establish that state policies permitting the disconnection of local service for nonpayment of long-distance charges interfere with the achievement of a valid federal regulatory objective. Without such a showing, the Commission may not prohibit disconnection of local service if the result would be preemption of contrary state policies.[12/]

III.

CONCLUSION

Subscribers should be given the tools they need to control telephone toll charges. It has not been established, however, that disconnection of local service is a significant factor contributing to nonsubscribership. For this and other reasons, the Commission should not prohibit states from allowing disconnection of local service for nonpayment of long-distance charges.

Respectfully submitted,

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12/ Public Service Commission of Maryland v. FCC, *supra,* note 7; 909 F.2d at 1515 National Association of Regulatory Utility Commissioners v. FCC, *supra,* note 7, 880 F.2d at 431.